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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73 202(b),	)	MB Docket No. 03-57
FM Table of Allotments, FM Broadcast Stations	)	RM-10565
(Ft. Collins, Westcliffe and Wheat Ridge, Colorado)	)	

TO: Audio Division

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

Meadowlark Group, Inc. (hereinafter "MGI"), by its attorney, hereby respectfully replies to the Opposition to Petition for Reconsideration (hereinafter "Opposition"), filed in this proceeding by Jacor Broadcasting of Colorado, Inc. (hereinafter "Jacor") on April 20, 2004. In reply thereto, it is alleged:

1. In its Opposition, Jacor simply repeats the mantra that MGI's Counterproposal was somehow "contingent" upon the outcome of another rule making. That, of course, is factually incorrect. If MGI's Counterproposal was "contingent" on anything at all, it was contingent upon the disposition of an application (File No. BPH-20030424AAO) by Jacor to classify Station KRFX, Denver, Colorado, as a full Class C facility. The FCC staff never held that the Counterproposal was contingent upon another rule making. To the contrary, in its Order, dismissing the Creede Counterproposal, the staff remarked that, "Until the *application* for Channel 278C at Denver is dismissed, the Counterproposal filed by MGI is technically defective." *Report and Order*, released in this proceeding on March 19, 2004, at Paragraph 6. (Emphasis supplied) Thus, the issue is whether the pendency of the application requires

dismissal of the Counterproposal. As we will show, it does not.

2. In 1992, the Commission adopted procedures to afford cutoff protections to applications and those procedures purport to protect applications against subsequently filed rule makings. *Conflicts Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments*, 7 FCC Rcd 4917 (1992). It is also true that those procedures afford such protection from the day that an application is filed. However, those procedures do not apply here for two separate and independent reasons:

(a) The KRFX application is defective It requires a waiver of Section 73.313(d) of the Rules, and Jacor has failed to enunciate any good reasons to waive the Rule; and

(b) There is not, in fact, any conflict between the Creede Counterproposal and the KRFX application. When the HAAT in the KRFX application is calculated in accordance with 47 C F R Section 73.313(d), it turns out that it qualifies only as a Class C1 facility, and is entirely consistent with the Creede Counterproposal.

3. A search of the *Conflicts* Order and the subsequent Order in the same proceeding on reconsideration[1] fails to disclose any discussion or reference to the problem of defective applications. Neither does a search of the case precedents. Apparently, this case is one of first impression.

4 The procedures contemplated in the *Conflicts* Order were put in place to provide some degree of equity between applications to upgrade existing stations and petitions to amend the Table of Allotments. The Commission at that time recognized that applications to upgrade existing facilities had little chance of prevailing against new allotments in a 307(b) comparative process. By affording "cutoff" protection to upgrade applications, licensees could enjoy some

[1] 8 FCC Rcd 4743 (1993)

degree of certainty and were encouraged to upgrade, thus providing additional service.

5. In the matter of *Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application*, 8 FCC Rcd. 4735 (1993) (hereinafter "*One Step Order*"), the Commission described the process whereby an application is examined for tenderability:

> "The application undergoes an engineering analysis to verify compliance with the Commissions rules regarding . . . station class requirements with respect to tower height and operating power." *One Step Order*, at para. 3.

The use of the word "requirements" clearly indicates that the intent of the Commission was to afford cutoff protection based on class and coverage definitions contained in the rules. Further, the language makes clear that the objective was to protect and facilitate legitimate service improvements of real-world facilities by granting cutoff protection to applications after a review of ". . . tower height and proximity to airports." *Id* All of the parameters listed in paragraph 3 are physical, technical characteristics required in an application and are the characteristics to which cutoff attaches. To attribute cutoff protection to a request to *avoid* compliance with the rules is to unfairly weight the decisional process in favor of applications. Clearly, the balance between applications and petitions was a concern as the *One Step Order* says, ". . . this approach is consistent with our continuing efforts to encourage FM licensees to seek to improve service to the public . where doing so does not unfairly prejudice new applicants." *Id*, at para. 15.

6. The KRFX application is entitled to cutoff as to the proposed physical facility only MGI (along with a significant number of other commenters in this and related proceedings) has not opposed attributing cutoff protection to the actual applied-for facility of KRFX. But affording cutoff protection to the waiver request is another matter altogether and

goes far beyond the intent of the Commission in the *One Step Order*. By allowing a waiver request (in this case *not* to serve additional area and persons) to trump a meritorious petition or counterproposal, the Commission opens the door to inventive waiver requests of all kinds. For example, a licensee that learns of a plan to allot a new channel and faces possible market competition might apply for a higher class but seek a waiver of the spacing or city coverage requirements. If the staff treatment of the KRFX application is allowed to stand for the way waiver applications will be treated, such applications would be afforded cutoff protection and would frustrate new service requests with no countervailing public service benefit. The only rational approach is to ascribe cutoff protection to the physical facility applied for, consistent with the Commission's rules as to height, power, spacing, interference and class. And particularly in cases where commenters point out possible flaws in an application, the application must be adjudicated first. Physical facilities are entitled to cutoff protection, not requests to bypass the Commission's Rules or Section 307(b). *Id*, at para. 8. Where, as here, there is a mere *request* for waiver, considerations of sound public policy dictate that no cutoff protection should arise until the request is granted. Otherwise, licensees will be encouraged to file frivolous applications accompanied by frivolous requests for waivers, merely to frustrate downgrading.

7. If there is any doubt as to the likelihood of licensees attempting to frustrate requests for new services, one need only look at this case. The KRFX application was submitted in response to an Order to Show Cause and was identified by Jacor's counsel as specifically responsive to the Order. The Order to Show Cause was clear: Jacor must increase the antenna height of Station KRFX or be downgraded to C0. The response from Jacor was an application to reduce antenna height and a request for a waiver of the very height requirement that the Order to Show Cause sought to enforce!

8. It cannot be disputed that the Commission's paramount duty is to administer the mandate of Section 307(b) of the Communications Act to allocate spectrum in a fair, efficient, and equitable manner. *Allentown Broadcasting Corp v. FCC,* 349 U.S. 358 (1955). In this instance, blind adherence to the cutoff rule, in the case of the KRFX application achieves a result which is clearly contrary to that mandate, *i e* , denial of a counterproposal which would provide a first local service to a community of substantial size while, at the same time, providing a first or second reception service to significant numbers of people who presently lack such service.[2]

9 The precedent set in this case will have broad implications for future cases. If upheld, it will enable existing stations to defeat downgrading to Class C0 status, simply by filing applications - no matter how defective or ridiculous - to "upgrade" to Class C status. That was not the Commission's intention when it adopted the Class C0 rule. To the contrary, the Commission expressed concern over possible foot dragging by licensees facing downgrading, and went so far as to impose the requirement that stations resisting downgrading serve their opponents with copies of all correspondence with the FAA. *Streamlining of Radio Technical Rules*, 15 FCC Rcd 21,649 (2000), at para. 32. That requirement, standing alone, shows that the FCC was concerned with the *bona fides* of any such applications. Surely it did not intend to allow its rules to be used to achieve absurd results, such as the one presented here.

10. Finally, at paragraph 21 of its Petition for Reconsideration, MGI pointed to its previously advanced suggestion that even if KRFX is afforded full Class C status, the Creede Counterproposal can still be granted, simply by imposing a site restriction on the channel substitution at Poncha Springs. The staff ignored that suggestion. So has Jacor, perhaps because

[2] The FCC has gone so far as to waive substantial short spacing under Sections 73.207 and Section 73 215 of the Rules to accommodate allotments which serve white and gray areas. *R&S Media*, DA 04-960 (Media Bureau) released 04-13-2004

it has no good answer.

April 27, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kelli A. Muskett, a secretary in the law office of Lauren A. Colby, do hereby certify that copies of the foregoing have been sent via first class, U.S. mail, postage prepaid, this 28th day of April, 2004, to the offices of the following:

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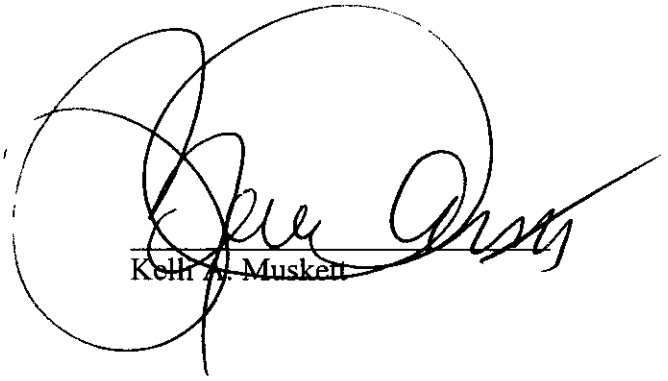

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